TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 25

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JACOB TROY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FILED APRIL 24, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

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JACOB TROY

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1 In United States District Court for the Middle District of Pennsylvania

No. 8694. June term, 1933

THE UNITED STATES

vs.

JACOB TROY

Docket entries

1933
June 7—Indictment: Vio. Revenue Act of 1928.
" " —A true bill.
Oct. 13—Petition for rule to show cause why indictment should not be quashed and
" " —Order granting rule to show cause returnable next argument court.

1934
Feb. 12—Answer to motion to quash indictment.
" 22—Opinion and
" " —Order making rule absolute and the indictment quashed.
Mar. 22—Petition for appeal and order allowing appeal.
" " —Assignment of errors.
" " —Statement of jurisdiction.
" " —Citation and notice and acceptance of service thereon.
" " —Certificate of presiding judge.
" " —Praecipe and notice of filing and acceptance of service thereon.
" " —Order directing the clerk to transmit the original transcript on appeal to the Solicitor General of the United States, Washington, D.C.
Apr. 2—Stipulation that the judgment to be entered in case # 8694, June term, 1933, by the Supreme Court of the United States shall also be entered in case no. 8695, June term, 1933.

2 In United States District Court

[Title omitted.]

Indictment

Filed June 7, 1933

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Middle District of Pennsylvania, at the June term of said court, in the year 1933, and inquiring for said district, upon their oath present: That Jacob Troy, late of the city of Wilkes-Barre, State of Pennsylvania, hereinafter in this indictment sometimes called the defendant, on, to wit, March 15, 1930, at Scranton, in said State, and in

the Middle District of Pennsylvania, and within the jurisdiction of this court, unlawfully did wilfully and knowingly attempt to defeat and evade a large part, to wit, $4,429.08, of a tax upon the net income of the Troy Oil Company, Incorporated, a corporation, for the calendar year 1929, which tax was imposed by an act of Congress approved May 29, 1928, entitled "An act to reduce and equalize taxation, provide revenue, and for other purposes", which act of Congress is known as the Revenue Act of 1928, which said unlawful and wilful attempt to defeat and evade said tax was by the means and in the manner following, that is to say:

That the said Troy Oil Company, Incorporated, hereinafter sometimes called the corporation, during the calender year 1929,
3 and up to and including March 15, 1930, was a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, engaged in the wholesale and retail gasoline and oil business, with its principal office and place of business at Wilkes-Barre aforesaid, in said State, and within the Twelfth Internal Revenue Collection District of Pennsylvania, and was not a corporation exempt from taxation under the provisions of the act of Congress aforesaid; and the said defendant, Jacob Troy, was at all times hereinafter set forth, and during the calendar year 1929, the duly elected and acting president and employee of the said corporation; that the regular annual accounting period of the said corporation was on the basis of the calendar year and not on the basis of a fiscal year, and the said corporation was then and there required by the act of Congress aforesaid, and pursuant to rules and regulations made and prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury of the United States of America, as authorized in and by virtue of the act of Congress aforesaid, to make to the collector of internal revenue for the said collection district, a return for the calendar year 1929, after the close of the calendar year 1929 and on or before March 15, 1930, stating specifically the items of its gross income and the deductions and credits allowed by title I (income tax) of the said act of Congress, duly sworn to by its president, vice president, or other principal officer and by its treasurer or assistant treasurer and, by reason of the fact, which the said grand jurors upon their oath charge to be a fact, that during the said calendar year 1929, the said corporation had and derived a gross income of, to wit, $172,668.07, derived as follows, that is to say:

4 Gross sales from trading or manufacturing, less returns and allowances	$331,136.39
Less: Cost of goods sold	158,768.32
Gross profit from trading	172,368.07
Dividends on stock of domestic corporations	300.00
Total income	172,668.07

and that during the said calendar year 1929 the said corporation was entitled to and allowed by the provisions of said title I of said

act of Congress deductions (in addition to deductions allowed in computing the "gross income" as aforesaid) in the sum of, to wit, $131,945.51, on account of the following:

Compensation of officers	$3,600.00
Rent on business property	5,135.08
Dividends	300.00
Interest	558.11
Taxes	11,093.76
Loss on sale of securities	23,791.30
Depreciation	1,369.38
Repairs	495.31
Other deductions:	
Employees' salaries and wages	9,833.69
Freight	27,854.65
Insurance	545.03
Light, heat, and power	2,856.62
Traveling expense	26.10
Miscellaneous expenses	44,486.48
Total deductions	131,945.51

and that said corporation had and derived and received a net income for said calendar year 1929, to wit, the gross income less the deductions allowed by law, of, to wit, $40,722.56, upon which said net income of said corporation for said calendar year 1929 an income tax of, to wit, $4,479.48, under the act of Congress aforesaid, became and was due by the corporation on, to wit, March 15, A.D. 1930, to the United States of America, one-fourth of the amount of which at least should then and there have been paid by the said corporation to the said collector of internal revenue for the said Twelfth Internal Revenue Collection District of Pennsylvania; and the said defendant,

Jacob Troy, as president of said corporation, well knowing
5 the premises aforesaid, and the corporation being indebted to the United States of America in the amount aforesaid by reason of the said tax imposed by the aforesaid act of Congress, and the said defendant, Jacob Troy, then and there well knowing that the gross income and the net income derived and had and received by the said corporation during the said calendar year 1929 were as aforesaid, on, to wit, March 15, 1930, at Scranton aforesaid, in the district aforesaid, unlawfully did willfully and knowingly attempt to defeat and evade a large part, to wit, $4,429.08, of the said tax upon the said net income of the said corporation for the calendar year 1929, and as an overt act in so unlawfully, willfully, and knowingly attempting to defeat and evade said tax, did, on, to wit, March 15, 1930, at Wilkes-Barre aforesaid, in the State aforesaid, make under oath an income-tax return for said corporation for said calendar year 1929, and thereafter and on, to wit, March 15, 1930, at Scranton aforesaid, in the State and District aforesaid, did file and cause to be filed with said collector of internal revenue for the said Twelfth Internal Revenue Collection District of Pennsylvania, said income-tax return for the calendar year 1929, prepared and sworn to as aforesaid, stating specifically therein the items of the gross income

of the corporation for the said calendar year 1929 to have been the sum of $28,126.37, and no more, derived as follows:

Gross sales from trading or manufacturing, less returns and allowances		$68,854.32
Less cost of goods sold:		
Inventory at beginning of year	$5,917.19	
Merchandise bought for sale	41,011.84	
Total	46,929.03	
Less inventory at end of year	6,201.08	
		40,727.95
Total income		28,126.37

and stating specifically the items of deductions (in addition to the deductions taken in computing "gross income" as aforesaid), allowed by the act of Congress aforesaid for the said calendar year 1929 to have been the sum of $24,668.23, on account of the following:

6	Compensation of officers	$3,600.00
	Rent on business property	3,800.00
	Interest	180.00
Taxes on gasoline		11,813.94
Other deductions not reported above:		
	Salaries and wages	3,300.00
	Freight	295.18
	Insurance	440.88
	Light	1,092.90
	Telephone	145.33
Total deductions		24,668.23

and stating therein no other items of deductions, and stating specifically the net income, to wit, the said gross income less the said deductions allowed by law for the said calendar year 1929, to have been the sum of $3,458.14, and no more, and showing the total tax due and payable by the said corporation thereon to have been $50.40, and no more, and paid and caused to be paid by said corporation to the collector of internal revenue for the said Twelfth Internal Revenue Collection District of Pennsylvania the sum of, to wit, $50.40, and no more, and furthermore, neither the said defendant nor the said corporation has ever made to the said collector of internal revenue any other income tax return for the said calendar year 1929 for and in behalf of said corporation, stating specifically the items of its gross income and the deductions and credits allowed by law, and neither the said defendant nor the said corporation has ever made any other payment or payments to said collector or to any other proper officer of the United States of any sums of money on account of the said tax debt of said corporation for said calendar year 1929; against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

ANDREW B. DUNSMORE,
United States Attorney.

A true bill:

_____ _____,
Foreman of the Grand Jury.

[File endorsement omitted.]

7 [Title omitted.]

In United States District Court

Motion for rule to show cause why indictment shall not be quashed

Filed Oct. 13, 1933

To the honorable, the judges of the above court:

Now, October 12, 1933, the above-named defendant asks that a rule be granted to show cause why the indictment in the aforesaid case shall not be quashed and assigns therefor the following reasons:

First. The indictment shows upon its face that the prosecution is barred by the statute of limitations.

Second. The offense is laid as having been committed on March 15, 1930. The indictment was returned in June 1933. The Federal statute of limitations covering this offense limits the term in which prosecution can be brought to three years after the commission of the offense.

"Third. The indictment is defective because it fails to aver that Jacob Troy was under a duty to perform the act in respect of which there was a violation charged of the act of Congress of May 29, 1928.

"The indictment is defective in that it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred and in the absence of this averment the indictment fails to set forth facts showing prima facie, a commission of the crime charged in the indictment."

8 A. M. Lucks,
R. L. Levy,
Attorneys for Defendant.

[*Duly sworn to by R. L. Levy jurat omitted in printing.*]

9 In United States Court

(Title omitted.)

Order granting rule to show cause filed October 13, 1933

Now, October 13, 1933, upon consideration of the within reasons, rule is granted to show cause why the indictment shall not be quashed, said rule to be returnable to August court.

Albert Watson,
United States District Judge.

10 In United States District Court

[Title omitted.]

Answer to motion to quash indictment

Filed Feb. 12, 1934

To the honorable the judges of the said court:

And now comes the United States of America by Herman F. Reich, assistant United States attorney in and for the Middle District of Pennsylvania, who, on its behalf replies and to the motion to quash the indictment, says:

1. The allegations of the first paragraph of the motion are denied both as a question of fact and as a question of law, and your affiant avers in further answer thereto that a prosecution is not barred by the statute of limitations; that the time in the said statute of limitations as to the particular offense charged in the indictment was extended to six years and that such extension to six years occurred by Act of Congress prior to the expiration of the period under the statute of limitations in existence prior to such Act of Congress extending the term of the statute, and that the said period of six years had not elapsed at the time of the indicting of the defendant herein.

2. The allegations of the second paragraph of the motion are denied, and for further answer thereto it is averred that, as a

11 matter of law, the statute of limitations covering this offense is six years together with a further period under the further provisions in the statute that, "The time during which the person committing any of the offenses above mentioned is absent from the district wherein same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings." And further, your affiant is informed and expects to prove if the same should be necessary, to extend the period beyond the regular term of the statute of limitations, that the defendant was absent from the district for a considerable period in the manner as contained in the said proviso, and did thereby prevent the running of the statute during that period, and that by reason thereof, as well as for the other reasons hereinbefore set forth, the period of the statute of limitations had not expired and the prosecution had not been barred by the statute of limitations.

3. The allegations of the third paragraph are denied and for further answer thereto it is averred that as a matter of law the indictment contains all necessary allegations to sufficiently and fully charge the defendant with the offense, and that as a matter of law it was not necessary to set forth that the defendant was under a duty to perform the act in respect of which the violation is alleged to have occurred in any manner other than as the same is alleged in the indictment, and the indictment does fully charge the commission of the

crime with language sufficient to constitute a legal, valid, and subsisting indictment fully charging the offense as completely as required by law.

12–13 Wherefore it is respectfully submitted that the prayer of the motion to quash should be denied.

HERMAN F. REICH,
Asst. U.S. Attorney.

[*Duly sworn to by Herman F. Reich, jurat omitted in printing.*]
[File endorsement omitted.]

14 In United States District Court for the Middle District of Pennsylvania

No. 8694. June Term, 1933

UNITED STATES OF AMERICA
vs.
JACOB TROY

Opinion

Filed February 22, 1934

The defendant was indicted on June 7, 1933, for a violation of the Revenue Act of 1928 (U.S.C.A., title 26, sec. 2146). The defendant filed a petition for a rule to show cause why the indictment should not be quashed, which rule was granted.

The third reason assigned in support of the rule to show cause is as follows:

"Third. The indictment is defective because it fails to aver that Jacob Troy was under a duty to perform the act in respect of which there was a violation charged of the act of Congress of May 29, 1928.

"The indictment is defective in that it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred and in the absence of this averment the indictment fails to set forth facts showing prima facie, a commission of the crime charged in the indictment."

The definition of the offense with which the defendant is charged in the indictment is found in that part of the Revenue Act of 1928, which reads as follows:

"Any person required under this title to collect, account for, and pay over any tax imposed by this title, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade of defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not
15 more than five years, or both, together with the costs of prose-

cution. (c) The term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

In the indictment it is alleged, inter alia, that the defendant on March 15, 1930, did wilfully and knowingly attempt to defeat and evade a large part, to wit, $4,429.08, of a tax upon the net income of the Troy Oil Company, Incorporated, for the calendar year 1929; that the defendant was the duly elected and acting president of said corporation; that the defendant, on March 15, 1930, did make under oath an income-tax return for said corporation for the year 1929; that, on March 15, 1930, the defendant did file said income-tax return; that said defendant did pay, and cause to be paid, by said corporation the total tax due and payable by said corporation on said income, and no more; that the actual income of said corporation for the year, for which said return was made, was far in excess of said income return, and that the income tax due the United States of America March 15, 1930, was far in excess of the income tax so paid.

Nowhere in the indictment is it alleged that the defendant was under a duty to perform the act in respect of which the violations occurred. It cannot be said that as the defendant was president of the corporation, he was under a duty to perform the acts which he is alleged to have performed. "Aside from his position as presiding officer of the board of directors and of the stockholders when convened in general meeting, the president of a corporation has by virtue of his office, merely, no greater power than that of any director. Whatever authority he has must be expressly conferred on him by statute, charter, or by-law or the board of directors or be implied from express powers granted, usage or customs, or the nature of the company's business." 14a Corpus Juris, sec. 1858.

16 In an indictment every fact necessary to constitute the crime charged must be positively alleged, and nothing can be charged by implication or intendment. "It may be said this is a very technical construction, but in criminal cases, where the liberties of the defendant are involved, no intendments can be indulged in favor of an indictment; it must allege 'all the facts necessary to bring the case within the intent of the act.'" United States vs. Horton, 282 Fed. 731.

In my opinion, it would be necessary to prove that the defendant was as president under a duty to perform the act which he is alleged to have performed in order to support a conviction, and such is not alleged in the indictment.

Now, February 22, 1934, the rule to show cause why the indictment should not be quashed is made absolute, and the indictment is quashed.

ALBERT L. WATSON,
United States District Judge.

[File endorsement omitted.]

17 In United States District Court for the Middle District of Pennsylvania

Petition for appeal and order allowing same

Filed March 22, 1934

Comes now the United States of America, plaintiff in the above-entitled cause, by Andrew B. Dunsmore, United States attorney in and for the Middle District of Pennsylvania, and conceiving itself aggrieved by the order entered in this cause on February 22, 1934, quashing the indictment, prays that an appeal may be allowed from said order to the Supreme Court of the United States, and in connection with this petition the United States presents herein its assignment of errors and statement of jurisdiction.

Dated March 22, 1934.

UNITED STATES OF AMERICA,

By its attorney:

ANDREW B. DUNSMORE,
United States Attorney.

Appeal allowed this 22 day of March 1934.

ALBERT L. WATSON,
United States District Judge.

[File endorsement omitted.]

18 In United States District Court

[Title omitted.]

Assignment of errors

Filed March 22, 1934

Comes now the United States of America, by Andrew B. Dunsmore, United States attorney in and for the Middle District of Pennsylvania, and in connection with its appeal makes the following assignment of errors:

1. The district court erred in quashing the indictment.

2. The district court erred in holding that the facts pleaded did not constitute a violation of any statute of the United States.

3. The district court erred in holding that the indictment is defective, in that it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred.

4. The district court erred in construing section 146 (b) of the Revenue Act of 1928 (upon which the indictment was founded) as requiring, as an essential element of the crime of wilfully attempting to evade or defeat the tax involved, that the defendant shall have

been under a duty to perform the acts which he in fact performed, and in connection with which the violation charged occurred.

Dated March 22, 1934.

THE UNITED STATES OF AMERICA.

By its attorney:

ANDREW B. DUNSMORE,
United States Attorney.

[File endorsement omitted.]

19 In United States District Court

[Title omitted.]

Certificate of presiding judge

Filed March 22, 1934

Now, March 22, 1934, it is certified that the order and judgment in the above-entitled cause made and entered, quashing the indictment, was based upon a construction of section 146 of the Revenue Act of 1928, c. 852, 45 Stat. 791 (the statute upon which the indictment was founded), my construction of said section being that it is essential to the existence of the crime of wilful attempt to evade or defeat the tax that the defendant shall have been under a duty to perform the act in respect of which the violation charged occurred, which duty should be alleged in the indictment.

ALBERT L. WATSON,
United States District Judge.

[File endorsement omitted.]

20 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed March 22, 1934

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the Supreme Court of the United States by including therein the following:

1. Indictment.
2. Petition for rule to show cause why indictment should not be quashed.
3. Order granting rule to show cause.
4. Answer to motion to quash.
5. Opinion and order making rule absolute.
6. Petition for appeal and order allowing same.

7. Assignment of errors.
8. Certificate of presiding judge.
9. Statement of jurisdiction.
10. Citation.
11. Docket entries.
12. This praecipe.

ANDREW B. DUNSMORE,
United States Attorney.

HERMAN F. REICH,
Asst. U.S. Attorney,
Counsel for Appellant.

21 In United States District Court

[Title omitted.]

Notice of filing praecipe

Filed March 22, 1934

To R. L. LEVY and A. M. LUCKS,
Attorneys for Defendant, Jacob Troy:

Please take notice that on the 22d day of March 1934 the undersigned filed with the clerk of this court, a praecipe for the record to be transmitted to the Supreme Court of the United States on the appeal taken in the above cause, a copy of which praecipe is herewith served on you.

Dated this 22d day of March 1934.

ANDREW B. DUNSMORE,
United States Attorney.

HERMAN F. REICH,
Asst. U.S. Attorney,
Counsel for Appellant.

Service of the within notice and copy of praecipe is hereby accepted this 22d day of March 1934.

A. M. LUCKS,
Attorney for Defendant (Jacob Troy).

22 In United States District Court

[Title omitted.]

Order directing transmittal of original transcript

Filed March 22, 1934

And now, to wit, March 22, 1934, upon motion of Andrew B. Dunsmore, United States attorney, the clerk of this court is directed

to transmit the original transcript on appeal in this case to the Solicitor General of the United States, Washington, D.C., for printing and docketing thereof.

ALBERT L. WATSON.
United States District Judge.

[File endorsement omitted.]

23 [Clerk's certificate to foregoing transcript omitted in printing.]

24 [Citation in usual form showing service on A. M. Lucks filed March 22, 1934, omitted in printing.]
[File endorsement omitted.]

25 In Supreme Court of the United States

Statement of points relied upon, and designation of entire record for printing

Filed April 27, 1934

Pursuant to Rule 13 of this Court, appellant specifies the following points upon which it intends to rely in the above-entitled cause:

1. The District Court erred in holding that the facts pleaded did not constitute a violation of any statute of the United States.

2. The District Court erred in holding that the indictment is defective in that it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred.

3. The District Court erred in construing section 146 (b) of the Revenue Act of 1928 (upon which the indictment was founded) as requiring, as an essential element of the crime of wilfully attempting to evade or defeat the tax involved, that the defendant shall have been under a duty to perform the acts which he in fact performed, and in connection with which the violation charged occurred.

The appellee deems the entire record, as filed, to be necessary for the consideration of the above contentions.

Dated: April 27, 1934.

J. CRAWFORD BIGGS,
Solicitor General.

[File endorsement omitted.]

26 In Supreme Court of the United States

No. 26. October term, 1934

Stipulation to abide result of cause no. 25

Filed April 25, 1934

Inasmuch as the issues presented in the above case are identical with those involved in The United States, Appellant v. Jacob Troy,

No. 25 on the docket of this Court for the present term (no. 8694 of the June term, 1933, of the District Court of the United States for the Middle District of Pennsylvania), it is hereby stipulated by and between counsel for the respective parties hereto, in order to save printing costs and to avoid duplication of documents, (1) that the printing of the record in this case be dispensed with; (2) that no brief shall be filed or oral arguments made in this case on behalf of either party; and (3) that the same judgment shall be entered by this Court in this case that it enters in no. 25, The United States, Appellant v. Jacob Troy (no. 8694 of the June term, 1933, of the District Court of the United States for the Middle District of Pennsylvania).

J. CRAWFORD BIGGS,
Solicitor General.
A. M. LUCKS,
R. L. LEVY,
Counsel for Appellee.

MARCH 26, 1934.

[File endorsement omitted.]

(Endorsement on cover:) File No. 38,588. M. Pennsylvania, D.C.U.S. Term no. 25. The United States of America, appellant, vs. Jacob Troy. Filed April 24, 1934. File no. 25 of 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934